IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA

WESTERN DIVISION

RONALD SEIBOLD,

Plaintiff, No. **C00-4004-DEO**

vs.

JOSEPH FRISBIE, JAY FLECKENSTEIN, STEVE TEN NAPLE, CITY OF SIOUX CITY,

Defendants. **ORDER**

On February 1, 2001, the defendants filed a "Combined Motion for Entry of a Protective Order Pursuant to Rule 26(c) Limiting Extent of Discovery." Doc. No. 14. The motion was denied in an order issues by the court on March 8, 2001. Doc. No. 19. In the court's order, the parties were ordered to submit to the court a joint proposed Protective Order, as well as a joint status report listing the issues remaining unresolved. The joint status report was filed on April 2, 2001. Doc. No 20. The Protective Order was submitted to the court and filed on April 4, 2001. Doc. No. 21.

Along with the joint status report, the defendants submitted to the court for *in camera* review documents with respect to which the defendants assert claims of privilege. The court now has completed its review of these documents, and rules as follows.[(1)]

1. The documents from the personnel file of Jay Fleckenstein identified on the attachment to this order shall be produced within five days from the date of this order. The remainder of the documents in the personnel file have been reviewed by the court and found not to be relevant to any issue in this case.

2. The documents from the personnel file of Steve Ten Napel identified on the attachment to this order shall be produced within five days from the date of this order. The remainder of the documents in the personnel file have been reviewed by the court and found not to be relevant to any issue in this case.

3. The four-page "offense report," dated September 19, 1999, in the folder identified as "Records Regarding Hospital Jay Fleckenstein," shall be produced within five days from the date of this order.

4. The four-page "confidential use of force report" of Steve Ten Napel shall be produced within five days from the date of this order.

5. The four-page "confidential use of force report" of Jay Fleckenstein shall be produced within five days from the date of this order.

6. The defendants claim the Internal Affairs files relating to this matter are confidential under Iowa Code Section 22.7(5) and (11),[(2)] and under *Shook v. City of Davenport*, 497 N.W.2d 883 (Iowa 1993), and *Schaffer v. Rogers*, 362 N.W.2d 552 (Iowa 1985). On their face, subsections 22.7(5) and (11) do not apply to prohibit disclosure of the investigative reports in the present case. In *Schaffer*, in circumstances similar to the present case, the Iowa Supreme Court held records of an internal affairs investigation were "prepared in anticipation of litigation," and therefore were privileged from disclosure without a showing of "substantial need" for the materials, and a further showing that the requesting party was "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id*., 362 N.W.2d at 556 (citing Fed. R. Civ. P. 26(b)(3); Iowa R. Civ. P. 122(c)). In *Shook*, the Iowa Supreme Court essentially reaffirmed its holding in *Schaffer*.

In both *Schaffer* and *Shook*, the court relied on the substantial showing made by the defendants that the internal affairs investigation was in anticipation of litigation. *Schaffer*, 362 N.W.2d at 555-56; *Shook*, 497 N.W.2d at 887; *see also Duck v. Warren*, 160 F.R.D. 80, 82 (E.D. Va. 1995). No such showing has been made in the present case. In any event, federal law, not state law, controls as to questions of privilege. *See Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985) ("Because the plaintiffs have sued the defendants for a violation of federal law, the federal law of privilege applies to this issue[,]" citing Fed. R. Evid. 501). *See also, e.g., Miller v. Pancucci*, 141 F.R.D. 292, 297 (C.D. Cal. 1992) (federal law of privilege applies in action brought under § 1983); *Kelly v. City of San Jose*, 114 F.R.D. 653, 655-56, 661 (N.D. Cal. 1987) (when balancing the interests of the parties in civil rights cases, the facts should be "pre-weighted" in favor of disclosure).

In general, federal courts have found reports of internal affairs investigations not to be privileged. *See Mercy v. County of Suffolk*, 93 F.R.D. 520, 523 (E.D.N.Y. 1982); *but see Mick v. Brewer*, 923 F. Supp. 181, 185 (D. Kan. 1996) (Internal Affairs report ordered produced, but report's "conclusion" not ordered produced). Based on the record in the present case, the court orders the production of the Internal Affairs files of both Fleckenstein and Ten Naple, in their entirety, within five days from the date of this order.[(3)]

7. The defendants claim the pre-employment psychological evaluations of Fleckenstein and Ten Naple are confidential under Iowa Code Sections 22.7(19).[(4)] There has been no showing that "disclosure could reasonably be believed by the custodian to interfere with the accomplishment of the objectives" for which the tests were administered. Again, however, this is a matter controlled by federal, not state, law.

The United States Supreme Court recognized a psychotherapist-patient privilege in federal civil rights actions in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). The Court held "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." 518 U.S. at 15, 116 S. Ct. at 1931. The Court extended the privilege to include communications made to licensed social workers in the course of psychotherapy. *Id.*

Notably, the *Jaffee* privilege is limited to communications made "in the course of diagnosis or treatment." The courts are split as to whether the privilege also should extend to other types of communications, such as those made in the course of 'fitness for employment' examinations. *Compare Siegfried v. City of Easton*, 146 F.R.D. 98, 102 (E.D. Pa. 1992) (pre-employment psychological exam records not protected by either psychologist-patient privilege or executive privilege doctrine, and their disclosure would not "cause specific and serious harm to the functioning of government"), *Soto v. City of Concord*, 162 F.R.D. 603, 618 (N.D. Cal. 1995) (discovery allowed, but limited to "only those mental or psychological records which concern the incident at issue, prior episodes of violence, or the officers' propensity for violence of the type alleged in the complaint"), *and Revelle v. Darby Borough Police*

Officer Trigg, 1999 WL 80283 (E.D. Pa. 1999) (*mem.*) (court allowed disclosure "only of evaluations which were made for employment, rather than counseling or treatment purposes"), *with Caver v. City of Trenton*, 192 F.R.D. 154 (D.N.J. 2000) ('fitness for duty' psychological reports protected by psychotherapist-patient privilege).

The records sought in the present case are pre-employment psychological evaluations; they are not records made in the course of diagnosis or treatment. As such, their disclosure should not have a chilling effect on doctor-patient communications, or cause harm to the functioning of government. Furthermore, the evaluations were made with the expectation that their results would be disclosed to the employer. Accordingly, the court finds they are not protected by the psychotherapist-patient privilege, and they should be disclosed. These documents shall be produced within five days from the date of this order.

IT IS SO ORDERED.

DATED this 23rd day of April, 2001.

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PAUL A. ZOSS

MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

1. All documents produced pursuant to this order are to be produced under the terms of the Protective Order.

2. 22.7. Confidential records. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:

* * *

5. Peace officers' investigative reports, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual.

* * *

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.

3. The defendants have not claimed an "official information" privilege. *See e.g. Miller v. Pancucci*, 141 F.R.D. 292, 299 (C.D. Cal. 1992); *Wong v. City of New York*, 123 F.R.D. 482 (S.D.N.Y. 1989).

4. 22.7. Confidential records. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:

* * *

19. Examinations, including but not limited to cognitive and psychological examinations for law enforcement officer candidates administered by or on behalf of a governmental body, to the extent that their disclosure could reasonably be believed by the custodian to interfere with the accomplishment of the objectives for which they are administered.